# Before the
# Administrative Hearing Commission
# State of Missouri

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| MISSOURI DENTAL BOARD, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 12-1158 DB |
| | ) | |
| ANTHONY RIZZUTI, D.D.S., | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION

We find cause for the Missouri Dental Board ("the Board") to discipline the license of Anthony Rizzuti.

## Procedure

On June 25, 2012, the Board filed a complaint seeking to discipline Rizzuti's dental license. Rizzuti's attorney was served with a copy of the complaint and our notice of complaint/ notice of hearing on July 18, 2012. The Board filed an amended complaint on August 8, 2012, and Rizzuti answered the complaint on September 14, 2012.

The Board filed a motion for summary decision ("the motion"), accompanied by a statement of uncontested material facts and suggestions in support of the motion, on February 26, 2013. Rizzuti filed suggestions in opposition to the motion and a motion to strike certain statements in the Board's statement of uncontested material facts on March 21, 2013. The Board responded to the suggestions in opposition and motion to strike on April 5, 2013.

Pursuant to 1 CSR 15-3.446(6)(A),[1] we may decide a motion for summary decision if a party establishes facts that entitle that party to a favorable decision and no party genuinely disputes such facts. Those facts may be established by stipulation, pleading of the adverse party, or other evidence admissible under the law. 1 CSR 15-3.446(6)(B). The Board's motion is accompanied by certified copies of court records. Rizzuti's suggestions in opposition and motion to strike are accompanied by affidavits from himself and two licensed psychologists. We make our findings of fact from the admissible evidence submitted.

**Findings of Fact**

1. Rizzuti was licensed by the Board as a dentist. His license was current and active at all relevant times, but expired November 30, 2012.

2. Rizzuti participated in online public chat rooms through Yahoo! Instant Messaging. The chat rooms posted rules that all participants should be 18 years of age or older.

3. During two separate online private chats, Rizzuti accepted file transfers that contained multiple nude images of children, some involving sexual activity and others of a sexually suggestive nature.

4. Rizzuti accepted the file transfer and saved it to his computer before he viewed the images. Later he opened the files and realized what the images were, but he did not delete the files. He also did not report receiving the files to the authorities.

5. Rizzuti did not request that pictures of child pornography be sent to him, visit child pornography internet sites, or purchase child pornography.

6. On January 29, 2009, Rizzuti was indicted by a grant jury in the United States District Court, Eastern District of Missouri, for possession of child pornography and another offense. He

[1] All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

was also charged with two crimes in relation to the same underlying conduct in the circuit court of St. Louis County. [2]

7. On December 1, 2009, Rizzuti pled guilty to felony possession of child pornography in violation of 18 U.S.C. § 2252(A)(a)(5)(B).

8. On July 8, 2010, judgment was entered in Rizzuti's case in federal district court. The other federal charge against Rizzuti was dismissed.

9. Rizzuti was sentenced to 72 months in the custody of the United States Bureau of Prisons. The court also ordered that Rizzuti comply with the requirements of the Sex Offender Registration and Notification Act and participate in a sex offense-specific treatment program. Rizzuti was also placed on lifetime supervised release upon his release from imprisonment and prohibited from having contact with children under the age of 18 without the written consent of his probation officer.

10. Before he was imprisoned, Rizzuti attended counseling sessions as part of pretrial sex offender group therapy. He came to realize that keeping the photographs and not turning them over to the authorities might have allowed the abuses to continue.

11. The Board had knowledge of Rizzuti's case in 2008. It renewed Rizzuti's license in November 2010.

12. The St. Louis County Circuit Court issued a nolle prosequi order as to the charges filed in that court on November 30, 2011.

**Conclusions of Law**

Sections 332.321.2[3] and 621.045.1 provide us jurisdiction to decide this complaint. The Board has the burden of proving by a preponderance of the evidence that Rizzuti has committed

[2] No date appears on the St. Louis County charging document.
[3] Statutory references are to the RSMo Supp. 2012 unless otherwise indicated.

an act for which the law allows discipline. *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012). A preponderance of the evidence is evidence showing, as a whole, that "'the fact to be proved [is] more probable than not.'" *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

Motion to Strike

Rizzuti asks us to strike paragraphs 4, 5, and 6 of the Board's statement of uncontested facts and the exhibits that relate to those paragraphs. He complains that those paragraphs and documents relate to the charges against him that were dismissed, and that they are "immaterial, impertinent or scandalous" and therefore subject to being stricken under Mo. R. Civ. Pro. 55.27(e).

Rule 55.27(e) is one of the Missouri Supreme Court's rules for civil actions in circuit court. Those rules have no force of law before this Commission except as the legislature specifically incorporates them by reference. *Dillon v. Director of Revenue*, 777 S.W.2d 326, 329 (Mo. App., W.D. 1989); *Wheeler v. Board of Police Comm'rs*, 918 S.W.2d 800, 803 (Mo. App., W.D. 1996). Rule 55.27 is not so incorporated. We deny Rizzuti's motion to strike.

Nonetheless, we agree with Rizzuti that the material that forms the subject of his motion is irrelevant in this case, because the Board has asked for discipline only under a statute that predicates a finding of cause on whether a "person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution[.]" Being charged with a crime is obviously not the same as being found guilty. Thus, in this decision, we describe only the crime to which Rizzuti pled guilty.

Cause for Discipline

The Board argues there is cause for discipline under § 332.321.2:

> The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any permit or license required by this chapter or any person who has failed to renew or has surrendered his or her permit or license for any one or any combination of the following causes:
>
> (2) The person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution pursuant to the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated pursuant to this chapter, for any offense an essential element of which is fraud, dishonesty or an act of violence, or any offense involving moral turpitude, whether or not sentence is imposed[.]

Section 332.321.2(2) provides for discipline if Rizzuti has pled guilty to a state or federal criminal offense when that offense: (1) is "reasonably related to the qualifications, functions or duties" of a dentist; (2) has an essential element of "fraud, dishonesty or an act of violence;" or (3) involves moral turpitude. The Board argues, and we address, only the last of these.

The statute does not define "moral turpitude," but the concept exists in other disciplinary contexts and has been examined by Missouri courts. For example, in attorney disciplinary cases, the Supreme Court has "long defined moral turpitude as 'baseness, vileness, or depravity' or acts 'contrary to justice, honesty, modesty or good morals.'" *In re Duncan*, 844 S.W.3d 443, 444 (Mo. 1993)(internal citations and quotations omitted). *See also Brehe v. Mo. Dep't of Elem. and Secondary Educ.*, 213 S.W.3d 720, 725 (Mo. App. W.D. 2007)(same definition used in discipline of teaching certificate).

Not all criminal acts are acts of moral turpitude. *Brehe*, 213 S.W.3d at 725. Missouri courts have examined several types of criminal acts in license discipline cases and held that

certain ones always constitute acts of moral turpitude, others may, and some never do. In *Brehe*, the court explained there are three categories of crimes:

1. crimes that necessarily involve moral turpitude, such as fraud (so-called "Category 1" crimes);
2. crimes "so obviously petty that conviction carries no suggestion of moral turpitude," such as illegal parking ("Category 2" crimes); and
3. crimes that "may be saturated with moral turpitude," yet do not necessarily involve it, such as willful failure to pay income tax or refusal to answer questions before a congressional committee ("Category 3" crimes).

213 S.W.3d at 725 (*quoting Twentieth Century Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954)). While Category 3 crimes require inquiry into the circumstances, crimes such as murder, rape, and fraud fall into Category 1 because they are invariably regarded as crimes of moral turpitude. *Brehe*, 213 S.W.3d at 725.

Although our decisions do not carry precedential authority, *Central Hardware Co. v. Director of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994), we note that this Commission has previously decided that possession of child pornography is a Category 1 crime of moral turpitude.[4] Rizzuti, however, contends that summary decision is inappropriate in his case because possession of child pornography is a category 3 crime. He argues that the offense is one of "situational moral turpitude," rather than moral turpitude *per se.*

A person commits the crime of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) if he "knowingly possesses . . . any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography." Rizzuti argues that the history of this offense shows that possession alone, as opposed to creation of or trafficking in child pornography, is *malum prohibitum* rather than *malum in se*, and that mere

[4] *See Department of Health & Senior Services v. Benson*, No. 11-1268 DH (Dec. 13, 2011); *Bacon v. Director of Department of Insurance, Financial Institutions and Professional Registration*, No. 11-1548 DI (Nov. 4, 2011); *Henley v. State Bd. of Accountancy*, No. 10-1345 AC (May 16, 2011); *Department of Health and Senior Services v. Inman*, No. 07-1552 DH (Dec. 8, 2008).

possession was not a federal criminal offense at all until 1990. He points out that courts have recognized the distinction between mere possession and knowing receipt of child pornography. *See United States v. Myers*, 355 F.3d 1040, 1042-43 (7th Cir. 2004); *United States v. Skotzke*, 2007 WL 1584219, *4 (E.D. Mich. 2007). Rizzuti argues, therefore, that we must consider the facts and circumstances surrounding his conviction before we determine that it is for "an offense involving moral turpitude."

Few reported cases, and no Missouri cases, directly address the issue of whether mere possession of child pornography is a crime of moral turpitude, regardless of the circumstances involved. One that does is *In Matter of Grant*, 2011 WL 9375631 (Cal.Bar Ct.2011), which articulates Rizzuti's position:

> We do not view possession of child pornography as a crime involving moral turpitude in every case because the circumstances surrounding the conviction may vary. For example, actively searching for child pornography on the Internet, accessing it and then perusing and manipulating electronic images may constitute moral turpitude, while merely possessing child pornography after receiving it from an unsolicited source may not.

*Id.* at 2.

But the weight of authority is against this position. In *United States v. Santacruz*, 563 F.3d 894 (9th Cir.2009) (per curiam), a case construing the Immigration and Nationality Act ("INA") the court held that "possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) is a crime involving moral turpitude," *id*. at 897, without considering the circumstances of the crime. The 9th circuit's decision affirmed the federal district court's decision, which discussed the issue more fully:

> Recently, the BIA has held that possession of child pornography in violation of a Florida statute is a crime of moral turpitude under the immigration statutes. *In re Olquin-Rufino*, 23 I & N Dec. 896, 898, Int. Dec. 3529 (BIA 2006). The Board reasoned that the Supreme Court's linking of child pornography intrinsically to sexual abuse

> and exploitation of children makes the very existence of child pornography an affront to the rights of that child. This affront is so pernicious that mere knowing possession of such articles is sufficient for conviction under the U.S.Code. *Id.* at 897. The BIA has not documented an opinion on whether possession of child pornography in violation of federal statutes is likewise a crime of moral turpitude.
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> The Court agrees with the rationale of the BIA. The Supreme Court has long exempted child pornography from the obscenity test it outlined in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1971), on the grounds that the government has a compelling interest in protecting children from the harms that flow from exploitation for pornography. *New York v. Ferber,* 458 U.S. 747, 758, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). More recently, the Supreme Court has called child pornography and its resulting exploitation to be "an act repugnant to the moral instincts of a decent people." *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Furthermore, the language of 18 U.S.C. § 2252A and the Florida statute at issue in *In re Olquin-Rufino* are sufficiently analogous in that they both ban knowing possession of media depicting children in sexually explicit terms. *Compare* 18 U.S.C. § 2252A *with* Fla. Stat. § 827.071.
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> While 18 U.S.C. § 2252A does not require an "intrinsically evil" mens rea, the Court is not convinced by Santacruz's argument that "knowing possession" is not sufficiently turpitudinous to make the BIA's interpretation impermissible. Our society has determined that child pornography is, by its very existence, an affront to the rights of children and that possessing it encourages further exploitation. This satisfies the definition of moral turpitude required by the INA.

*U.S. v. Santacruz,* 2007 WL 2315455, 3-4 (C.D. Cal. 2007).

This treatment of the crime of possession of child pornography as a crime of moral turpitude despite no specific *mens rea* requirement is tantamount to treating it as a Category 1 crime under *Brehe.* We also find the reasoning persuasive. We conclude that possession of child pornography under either § 573.037 or 18 U.S.C. § 2252A(a)(5)(B) is a Category 1 crime of moral turpitude.

Even if we accepted Rizzuti's argument that possession of child pornography is a Category 3 crime, however, we would still grant the Board's motion. Rizzuti did not seek out images of child pornography, but once he received them, he maintained them on his computer and neither deleted them nor reported them to the authorities. We conclude that even if possession of the images is a Category 3 crime, Rizzuti's failure to delete the images or report them to the authorities makes his crime one of moral turpitude.

Rizzuti raises several other issues in his defense. He has presented affidavits from two licensed psychologists who appear to be experts in the field of treating individuals with convictions for crimes similar to his. Both opine that possession of child pornography is not an indicator that a person has or will commit a hands-on sexual offense, or that a person has deviant sexual interests in children. They also opine that persons convicted of possession of child pornography and other internet sex offenses that serve a period of incarceration, participate in a sex offender treatment program, and are subsequently supervised upon release have a very low rate of recidivism of either possession offenses or hands-on sex offenses. This evidence is appropriate for the Board to consider in determining the degree of discipline to impose on Rizzuti, but not for this Commission in determining whether cause exists to discipline his license.

Rizzuti's Affirmative Defenses

Rizzuti raises two affirmative defenses. The first is that the Board was aware of his conviction when he applied for renewal of his license in 2010, but renewed the license anyway. Rizzuti argues that if the Board does not address this issue, its motion should be treated as one for partial summary decision on the issue of the characterization of his offense as one of moral turpitude per se or situational moral turpitude. The Board addressed this issue in its reply suggestions, arguing that possession of child pornography is a Category 1 offense, and we have

addressed it by determining that even if it is a Category 3 offense, we would still find that Rizzuti committed an offense of moral turpitude. We find that Rizzuti's assertion of this affirmative defense does not bar us from entering summary decision on the Board's motion.

Rizzuti also challenges the constitutional validity of the statutory grounds for disciplining his license under the due process clauses of the United States and Missouri constitutions. We have no authority to declare a statute unconstitutional. *State Tax Comm'n v. Admin. Hearing Comm'n,* 641 S.W.2d 69 (Mo. banc 1982). Rizzuti acknowledges this, but expressly wishes to preserve his constitutional challenge. He has raised the issues, and they may be argued before the courts if necessary. *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222 (Mo. App., W.D. 1993).

**Summary**

Because Rizzuti pled guilty to a crime of moral turpitude, we find cause to discipline his dental license under § 332.321.2(2).

SO ORDERED on May 29, 2013.

*\s\ Karen A. Winn*
KAREN A. WINN
Commissioner